SUPREME COURT, U.S.

APR 27 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1966

No. 1330

GRACE LINE, INC. and S.S. SANTA LUISA,

Petitioners,

—against—

JOSEPH SCOPAZ and MILES PEROS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

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GRACE LINE, INC. and S.S. SANTA LUISA,

Petitioners,

—against—

JOSEPH SCOPAZ and MILES PEROS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners (hereinafter referred to as petitioner), pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on January 30, 1967.

Opinions of the Courts Below

The memorandum decisions of the United States District Court for the Southern District of New York are unreported. They appear at pages 12a-13a and 33a-34a, of the Appendix of the Court of Appeals. The opinion of the Court of Appeals is reported at 372 F. 2d 403, and appears at pages 82a-89a, of the said Appendix, as well as in the Appendix to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on January 30, 1967. The jurisdiction of this Court is invoked under Title 28 U. S. C. §1254 (1).

Questions Presented

1. Whether a longshoreman, in the direct employ of a private shipowner who has not delegated the control and operation of the vessel to a bareboat charterer, may sue his shipowner employer, or its vessel, for liability beyond statutory compensation because of injuries suffered as a result of the ship's unseaworthy condition, or whether §5 of the Longshoremen's and Harbor Workers' Compensation Act (Longshoremen's Act) 33 U. S. C. §905, provides the longshoreman with his exclusive remedy?

2. Has *Reed* v. *The YAKA*, 373 U. S. 410 (1963), imposed liability, other than payment of statutory compensation benefits, upon a shipowner employer of a longshoreman for injuries resulting from unseaworthiness, in the absence of an express or implied obligation of the employer to a third-party for such unseaworthiness?

3. Did the court below err in holding that there are two different standards of exclusivity of remedy under federal compensation acts for injuries due to unseaworthiness, one applicable only where the federal government is the shipowner, and the other applicable to private shipowners?

Statutes Involved

The statutory provisions involved are 33 U. S. C., §§905 and 933 (a) of the Longshoremen's and Harbor Workers' Compensation Act; 5 U. S. C., §8116 (c) of Public Law 89-554 approved September 6, 1966, formerly 5 U. S. C. §757 (b) of the Federal Employees' Compensation Act, which provide as follows:

33 U. S. C. Section 905:

"EXCLUSIVENESS OF LIABILITY. Sec. 905. The liability of an employer prescribed in Sec. 904 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Chapter, or to maintain an action at law, or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

33 U. S. C. Section 933 (a)

"If on account of a disability or death for which compensation is payable under this Chapter the person entitled to such compensation determines that

some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

5 U. S. C. Section 8116 (c)

"(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel."

Statement

Respondents were longshoremen-employees of petitioner Grace Line Inc., the title owner of the vessels on which respondents were injured. These vessels were not bareboat chartered to a third party but were solely owned, operated and controlled by petitioner.

Respondent Peros sued petitioner Grace Line Inc. and the SS SANTA LUISA, *in personam* and *in rem*, while respondent Scopaz sued Grace Line Inc. *in personam*.

Petitioner had complied with the provisions of the Longshoremen's Act and pursuant thereto paid statutory compensation benefits to respondents and also paid their medical expenses. Their suits for damages subsequently followed.

By stipulation, the parties agreed to the facts and damages. This left for determination by the court only the legal issue as to whether §5 of the Longshoremen's Act provided respondents with their exclusive remedy.

The District Court, on motion for summary judgment, rejected the defense that the exclusive remedy provision of the Longshoremen's Act barred recovery of damages directly against an employer-shipowner and directed judgment for respondents.

The Court of Appeals for the Second Circuit recognized that if the employer-shipowner had been the United States instead of a private shipowner, the employee would be restricted to compensation benefits, although injured by an unseaworthy vessel, citing at footnote 6 (372 F. 2d 403, 406) of its opinion *Johansen* v. *United States*, 343 U. S. 427 (1952); *Patterson* v. *United States*, 35 U. S. 495 (1959); *United States* v. *Demko*, 385 U. S. 149 (1966). In affirming the decision of the lower court, however, the Court of Appeals relying on *Reed* v. *The YAKA, supra*, held that considerations of exclusivity are quite different when the federal government is involved rather than a private individual. That Court of Appeals misread the *YAKA* decision as holding "in the clearest terms * * * that §5 of the Longshoremen's Act did not prevent an employee from suing his employer for breach of the warranty of seaworthiness, when his employer was also the owner of the vessel," and concluded the petitioner's arguments "should be addressed to Congress and not to this Court." Yet

just a few days ago the First Circuit on April 20, 1967, in *Alcoa Steamship Company, Inc.* v. *Perez Rodriguez, infra,* found "it difficult to determine the intended scope of the *YAKA* case."

Reasons for Granting Writ

1. The importance of the questions presented herein was recognized by this Court in *Jackson* v. *Lykes Bros. Steamship Co.,* No. 575, October Term 1966, which was argued on April 12, 1967. Certiorari was granted in that case on a petition which urged the conflict of the decision there sought to be reviewed with *Reed* v. *YAKA* as one of the reasons for granting the writ. However, that case may not resolve some of the questions involved here concerning the extent of the liability of an actual shipowner for injuries to a longshoreman resulting from breach of the warranty of seaworthiness in an admiralty suit brought *in personam* as well as *in rem.*

2. The Court of Appeals for the First Circuit in *Alcoa Steamship Company Inc.* v. *Perez Rodriguez,* decided on April 20, 1967 (not yet reported), confessed that it found "it difficult to determine the intended scope of the *YAKA* case." It went on, however, to interpret the case in conflict with the interpretation given to *YAKA* by the Second Circuit below, saying:

> "* * * For the fact is that the longshoreman's suit in that case was not brought against his employer but rather against the vessel on which he was injured, which was in fact owned by a third party, Waterman Steamship Corporation. It was the shipowner which brought in the longshoreman's employer, a bareboat charterer of the vessel, as a third party

defendant alleged to be liable over to the shipowner under the indemnity terms of the charter. *Reed* v. *The YAKA*, D. C. Pa. 1960, 183 F. Supp. 69, 77. It was on this theory, under the doctrine of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 1956, 350 U. S. 124, that the district court entered the judgment in favor of the longshoreman which the Supreme Court ultimately affirmed."

It is respectfully submitted that the interpretation placed upon *YAKA* by the First Circuit is correct, and conforms with this Court's recent decision in *United States* v. *Demko*, 385 U. S. 149 (1966), wherein the rule of exclusivity of remedy under compensation laws in general was recognized, Mr. Justice Black, saying (at p. 151):

> "Historically, workmen's compensation statutes were the offspring of a desire to give injured workers a quicker and more certain recovery than can be obtained from tort suits based on negligence and subject to common-law defenses to such suits. Thus compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions. A series of comparatively recent cases in this Court has recognized this historic truth and ruled accordingly. *Johansen* v. *United States*, 343 U. S. 427 and *Patterson* v. *United States*, 359 U. S. 495, for instance, are typical of the recognition by this Court that the right of recovery granted groups of workers covered by such compensation laws is exclusive. Such rulings of this Court have established as a general rule the exclusivity of remedy under such compensation laws."

3. The *Demko* case went further in limiting the liability to compensation than the cited *Johansen* and *Patterson*

cases. Those maritime claim cases involved the specific exclusivity provisions of the Federal Employee's Compensation Act that are almost identical with the exclusivity provisions of the Longshoremen's Act in contrast to 18 U. S. C. §4126 which has no words of exclusion. Yet this Court held that the presumption is that a compensation act is exclusive unless a contrary congressional intent appears, stating that "There is no indication of any congressional purpose to make the compensation statute in 18 U. S. C. §4126 non-exclusive."

It is thus clear that the Government's liability to its employees is limited to compensation under the Federal Employee's Liability Act, and that this substituted limited liability in place of liability under the general maritime law is not grounded on sovereign immunity concepts, as the court below suggests, but on the general principle that a compensation statute excludes all liability of an employer to an employee other than compensation.

Since the exclusive remedy provision of the Federal Employees' Liability Act is almost identical with that of the Longshoremen's Act and both must be construed the same (*Weyerhauser S.S. Co.* v. *United States*, 372 U. S. 597, 602 (1963), there is no sound basis for the Second Circuit interpreting the exclusivity provisions differently and applying one standard to the federal government and a less favorable standard to private shipowners. The various federal compensation acts should be construed in harmony, particularly with respect to maritime workers.

4. The Second Circuit misconstrued the scope of the *YAKA* case and it overlooked this Court's subsequent decision in *Italia Soc.* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964) which reaffirmed that the exclusivity provisions of the Longshoremen's Act are not affected where the ship-

owner does not delegate the operation and control of the vessel to a third party. In *Italia* this Court, referring to the *YAKA* case (at p. 325, footnote 2) emphasized the three vital elements of the *YAKA* case which are not present here: the employer there was the charterer, a third person was the shipowner who had delegated operation and control to the charterer, and there was an express agreement of indemnity from the stevedore to the shipowner, saying:

> "*Reed* v. *The YAKA*, 373 U. S. 410, held only that a longshoreman could bring suit for unseaworthiness against a stevedoring company which chartered a ship and was the longshoreman's employer. In that case no issue as to an implied warranty of workmanlike service arose because the stevedoring company had agreed in any case to hold the shipowner harmless without regard to negligence."

Furthermore, to allow suits for damages where there is no third person involved would violate the economic standards of the Act because the employer's right to subrogation, assignment, and deficiency compensation would be curtailed or destroyed in direct contradiction of the principles set forth in the *YAKA* case. These rights of the employer remain intact and the economic standards of the Act are not violated, so long as there is a third person involved. But these rights cannot be exercised by permitting a direct suit against an employer-shipowner where there is no third party, and the result would be to impose a greater financial burden on the shipowner-employer contrary to the economic standards of the Act.

To urge that because the maritime law is so ancient, the liability of a shipowner to his employee for damages under

such law is not displaced or affected by the liability of the employer to his employee for compensation, emphasizing that a longshoreman has the right to damages for unseaworthiness because he performs the work of a seaman, misconceives the question. If this were true, seaman Johansen (in *Johansen* v. *United States*, 343 U. S. 427, relied on by Mr. Justice Black in *Demko* as a "typical" case of recognition that the right of recovery "by such compensation laws is exclusive") who sought damages against the government shipowner-employer for the "unseaworthiness of his vessel" and for "maintenance and cure" would have been able to recover such damages from his employer despite the exclusivity provision of the Federal Employee's Compensation Act, but this Court held exactly the opposite in restricting the liability of the shipowner-employer to the seaman-employee to compensation.*

The personal liability which made the vessel liable *in rem* in *YAKA* could not have followed without the delegation of the operation and control of the vessel to the third-party bareboat charterer and the resulting obligation to indemnify the original owner.

This was Judge Learned Hand's reasoning in the second *Grillea*** decision and so recognized by the Second Circuit in *Bennett* v. *The MORMACTEAL*, 254 F. 2d 138 (1958) in its adoption of the district court's opinion reported at 160 F. Supp. 840. There he held that although the liability

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* *Johansen* held that the 1949 amendments to the Federal Employees Compensation Act adding subsection (b) of 5 U. S. C. §757 (now subsection (c) of 5 U. S. C. §8116) did not alter the exclusivity of the compensation remedy for government employed seamen.

** *Grillea* v. *United States*, 232 F. 2d 919 (2 Cir. 1956). The first *Grillea* decision cited by Mr. Justice Harlan in his *YAKA* dissent decided only the question of the liability of the demisor-owner, *in personam*, holding that it was not so liable. *Grillea* v. *U. S.*, 229 F. 2d 687 (2 Cir. 1953).

of the demisee (bareboat-charterer-employer) to his employee was only for compensation under the Longshoremen's Act, "the injuries to the employee" in breach of the indemnity contract with the demisor "measure the damages for the breach" and made it a case of personal liability for unseaworthiness similar to the *Ryan* case, cited at footnote 9 of his opinion. In view of this holding of personal liability, Judge Hand (as in the *YAKA* case) found it unnecessary to decide "the question whether a maritime lien can be imposed upon a ship for a claim on which no jural person is liable 'in personam'."

Since the circumstances in this case do not involve any liability to a third party, the holding that the petitioner is liable "to the employee" beyond compensation would be in actual and specific contravention of section 5 of the Longshoremen's Act and is not justified by the *YAKA* decision.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 26, 1967

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 285—September Term, 1966.

(Argued January 11, 1967 Decided January 30, 1967.)

Docket No. 30851

JOSEPH SCOPAZ and MILE PEROS,

Appellees,

—v.—

S.S. SANTA LUISA and GRACE LINE, INC.,

Appellant.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*, granting appellees' motions for summary judgment.

Affirmed.

KAUFMAN, *Circuit Judge*:

The sole issue presented by this appeal is whether a longshoreman, in the direct employ of a shipowner, may sue the latter for injuries suffered as a result of the ship's unseaworthy conditon, or whether §5 of the Longshoremen's and Harbor Workers' Compensation Act (Long-

shoremen's Act), 33 U. S. C. §905, provides a longshoreman with his exclusive remedy.

Our task has been simplified by the parties' stipulation on the facts and the issue of damages. Briefly stated, Joseph Scopaz and Mile Peros (appellees), both longshoremen, were injured while in the direct employ of appellant, Grace Lines, Inc. (Grace). Scopaz sustained his injuries aboard the SS SANTA ANNA when the top rung of the ladder he was descending became detached, causing him to fall into the hold below. Peros was injured while storing cargo on the SS SANTA LUISA. The space between seatainers stored in the hold of the ship had not been bridged with dunnage boards, and Peros accidentally stepped into the hiatus and fell a distance of 8 feet.

Appellees brought their present actions in the District Court to recover damages for the injuries they sustained.[1] Grace candidly stipulated that the SANTA ANNA and the SANTA LUISA were unseaworthy at the time the accidents occurred, and that this condition was the proximate cause of appellees' injuries. The only determination left for Judge Murphy was whether §5 of the Longshoremen's Act provided appellees with their exclusive remedy. All parties moved for summary judgment; the judge denied Grace's motion and granted motions of Scopaz and Peros,[2] and from this grant Grace appeals.

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[1] The action by Scopaz was originally brought at law, but was later transferred by stipulation and order from the civil side of the District Court to the admiralty docket. Peros brought 2 actions, one at law against Grace, and a separate suit in admiralty against Grace *in personam* and *in rem* against the SS SANTA LUISA.

[2] Judgment was entered in favor of the appellees, awarding them damages in the amounts agreed upon in the stipulations. Grace was ordered to pay Scopaz $50,000 with interest at 6% on $45,992.18. It was provided, however, that $4,007.82, previously paid to appellee as statutory benefits under the Longshoremen's Act, be withheld by Grace. Peros was awarded $28,350 with interest at 6% on $19,593.74. Grace withheld $8,756.26, the sum it had already paid appellee under the Act.

Section 5 of the Longshoremen's Act provides in relevant part:

> The liability of an employer . . . shall be exclusive and in place of . . . all other liability . . . to the employee . . . and anyone otherwise entitled to recover damages from such employer . . . at law or in admiralty . . .[3]

It would appear at first blush that since Grace clearly is the appellees' "employer,"[4] the Act would bar the instant suits. But, a careful analysis of the apposite cases leads us to the conclusion that Judge Murphy properly granted summary judgment against Grace.

In *Reed* v. *The YAKA*, 373 U. S. 410 (1963), the pivotal case in this area, a libel *in rem* was filed by Reed, a longshoreman, against the ship to recover for injuries suffered while unloading the vessel. The *YAKA's* owner, Waterman Steamship Company (Waterman), brought in, as an additional party, Pan-Atlantic Steamship Corporation (Pan-Atlantic), the operator of the ship under a bareboat

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[3] The section goes on to provide that:

> if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. . . .

The parties stipulated that Grace had at all times insured its liabilities under the Act, and had otherwise complied with its terms. Pursuant to the Act, Grace paid the appellees benefits for temporary total and temporary partial disability, and for their hospital and medical expenses. See note 2, *supra*.

[4] The Act defines an "employer" as one "whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States . . . ." 33 U. S. C. §902(4). The term "employee" is defined negatively as "not . . . [including] a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U. S. C. §902(4). There is no controversy as to whether appellees are "employees" within the meaning of the Longshoremen's Act.

charter at the time of the accident. The district judge found the *YAKA* unseaworthy, and allowed Reed to recover against the ship. The judge also decided that Waterman could recover against Pan-Atlantic under the indemnity clause in the bareboat charter agreement. 183 F. Supp. 69 (E. D. Pa. 1960).

On appeal, the Court of Appeals for the Third Circuit reversed this holding and decided that neither Waterman nor Pan-Atlantic was liable *in personam* for the unseaworthiness, and that a libel *in rem* against the ship could not properly be sustained unless there was an underlying personal liability. 307 F. 2d 203 (1962). But the Supreme Court in turn reversed the Court of Appeals and held that Pan-Atlantic was liable *in personam* for the unseaworthiness of the ship. The Court recognized that the law of admiralty ordinarily treats a bareboat charterer as if it were the owner, and indeed it is generally referred to as the owner *pro hac vice*. The majority opinion, authored by Mr. Justice Black, concluded that a bareboat charterer can be held liable *in personam* for the unseaworthiness of a chartered vessel in the absence of an explicit statutory exemption. The only question remaining for resolution, therefore, stated the Court, "is whether the Longshoremen's Act prevents recovery by petitioner [Reed] for Pan-Atlantic's breach of its warranty of seaworthiness." 373 U. S. 410. The response to this query was in the negative. Justice Black observed that the Court's decision in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), already had determined that a shipowner's warranty of seaworthiness extended to a longshoreman injured while unloading a ship, even though he was employed by an independent stevedore —a decision based in large measure on the "humanitarian policy" of the doctrine of seaworthiness, and the view that in passing the Longshoremen's Act, Congress had not intended to eliminate the traditional remedies of the sea.

It was apparent, therefore, that under the *Sieracki* doctrine, even if Reed had been employed by an independent stevedore rather than directly by the owner *pro hac vice*, he could have recovered from the owner for the injuries he suffered. It would be disingenuous, the Supreme Court concluded, to permit this right of recovery to be lost merely because the owner was also the longshoreman's employer and compensation was available under the Longshoremen's Act.

Justice Black elaborated on his *ratio decidendi* in the following terms:

> [A] shipowner's obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the absence of contracts . . . [T]he shipowner's obligation is rooted, not in contracts, but in the hazards of the work. . . . [O]nly blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen but also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and non-delegable obligation of seaworthiness which it should not be permitted to avoid. We have previously held that the Longshoremen's Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." We think it would cause a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman

working for a stevedoring company. 373 U. S. at 414-15 (footnotes omitted).

This reasoning and the Court's decision in *The YAKA* are clearly dispositive of the question presented to us. Grace was under a duty to provide a seaworthy ship. It is certain that if Scopaz and Peros had been employed by an independent stevedore, they could have recovered damages from Grace for the injuries they suffered as a result of its ships' unseaworthy condition. The need for protection from unseaworthiness does not diminish merely because of the fortuitous circumstances of one's technical employment. It is too late in light of *The YAKA* and the extensions of coverage under the general Maritime Law by the Supreme Court, to hold that Grace can avoid these far-reaching developments and escape its duty to provide a seaworthy vessel, merely by direct hiring of its own longshoremen.

Grace, however, urges us to distinguish *The YAKA* from the present case. It submits the interesting argument that the Supreme Court's opinion should be read narrowly as merely holding that where an employer (Pan-Atlantic) is indirectly liable to a longshoreman for damages because of its duty to indemnify the shipowner,[5] the employer may be liable directly to its employee. In the present case, appellant says, the three party situation found in *The YAKA* does not exist. Grace's syllogistic argument is that the employer's liability, rather than being based on a duty to indemnify, as it was in *The YAKA*, runs directly to the employees, and thus our interpretation of *The YAKA* is faulty.

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[5] In *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Co.*, 350 U. S. 124 (1956), the Supreme Court held that where an injured longshoreman recovered damages from the shipowner for breach of the warranty of seaworthiness, the shipowner could assert the stevedore's contractual liability to it, and recover indemnity. Even in the absence of an express agreement for indemnity, the stevedore was liable over to the shipowner for breach of its promise to store the cargo safely.

We believe that Grace's interpretation of *The YAKA* holding is grounded on a misreading of that decision. The Supreme Court did not decide that Waterman (the shipowner) was liable for unseaworthiness. "Whether a bareboat charter absolves the owner from liability on its warranty of seaworthiness is a question . . . we do not reach . . ." 373 U. S. at 411 n. 1. Thus, it is clear that Reed's right to sue Pan-Atlantic (his employer and owner *pro hac vice*), was not based on any hypothesis that Pan-Atlantic had a duty to indemnify Waterman, if the latter were liable because of the ship's unseaworthy condition. "The only question," the Court stated, "is whether the Longshoremen's Act prevents recovery by petitioner for Pan-Atlantic's breach of *its* warranty of seaworthiness." 373 U. S. at 412 (emphasis added). In the clearest terms the Court concluded that §5 of the Longshoremen's Act did not prevent an employee from suing his employer for breach of the warranty of seaworthiness, when his employer was also the owner of the vessel.

Nor do we see any merit in the attempted distinction that Reed did not sue his employer *in personam*, but rather brought an *in rem* action against *The YAKA*. The Supreme Court determined that Reed "was not barred by the Longshoremen's Act from relying on *Pan-Atlantic's liability as a shipowner for the YAKA's unseaworthiness* in order to support his libel in rem against the vessel." 373 U. S. at 415-16 (emphasis added). Thus, the crux of the opinion in *The YAKA* was the employer's *in personam* liability to its employees.

We have considered appellant's other arguments and find them equally devoid of any merit.[6] In sum, we view

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[6] Appellant relies, for example, on several Supreme Court cases which have held that certain compensatory schemes under which the federal government is liable, are exclusive. See *Johansen* v. *United States*, 343 U. S. 427 (1952); *Patterson* v. *United States*, 359 U. S. 495 (1959);

appellant's contention as an attack upon the holding in *The YAKA;* such arguments, however, should be addressed to Congress and not to this Court.[7]

Affirmed.

United States v. *Demko,* —— U. S. —— (1966). But the considerations are quite different when the government is involved rather than a private individual. As the Supreme Court noted in the *Johansen* case, "a comprehensive plan for waiver of sovereign immunity, in the absence of specific exceptions, would naturally be regarded as exclusive." 343 U. S. at 440.

[7] We are not alone in our interpretation of the Supreme Court's holding in *The YAKA.* Every court that has been asked to apply that decision to facts similar to those presented to us has concluded that §5 of the Longshoremen's Act does not bar a suit against the shipowner-employer. See, e.g., *Pacific Inland Nav. Co.* v. *Course,* —— F. 2d —— (9th Cir. 1966); *Hertel* v. *American Export Lines,* 225 F. Supp. 703 (S. D. N. Y. 1964).

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Jurisdiction

The jurisdictional requisites are sufficiently set forth in the petition.

Question Presented

There is one basic and fundamental question presented: whether a longshoreman, in the direct employ of a private shipowner operating his own vessel, injured by the

unseaworthiness of the vessel whereon he is performing traditionally seaman-like duties in a cargo operation, can recover damages from such shipowner-employer, in the light of the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

Statute Involved

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act are set forth below:

33 U.S.C. Sec. 905:

> "EXCLUSIVENESS OF LIABILITY. Sec. 905. The liability of an employer prescribed in Sec. 904 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Chapter, or to maintain an action at law, or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

The other statutory references (Petition pp. 3 and 4) are not here involved.

Statement

All the material facts herein were stipulated as appears from the opinion of the Court below.

Respondents were longshoremen directly employed as such by petitioner, and were injured in the course of cargo operations as the result of the unseaworthiness of petitioner's vessels. Petitioner was in the dual capacity of employer and owner-operator in control of the vessels.

Petitioner had complied with the provisions of the Longshoremen's and Harbor Workers' Compensation Act and provided benefits pursuant thereto. Pursuant to the stipulations above referred to, provision was made to subtract the amounts of statutory benefits paid from the amounts of the damages as also stipulated.

All parties moved for summary judgment on the agreed facts, and the Court directed judgment for the respondents, holding insufficient the defense that the provisions of the Longshoremen's and Harbor Workers' Act barred recovery of damages.

The Court of Appeals affirmed the judgment of the District Court (Appendix 1a-8a). In so doing, the Court of Appeals stated (p. 6a of Appendix) that

> "This reasoning and the Court's decision in *The Yaka* are clearly dispositive of the question presented to us."

referring to *Reed* v. *The Yaka,* 373 U. S. 410 (1963), at pages 414-415.

Argument

Only one issue is presented. Review by this Court is not warranted.

As will be demonstrated, the decision below was correct and was reached on the authority of this Honorable Court's decision in *Reed* v. *The Yaka,* which the opinion regarded as ". . . clearly dispositive of the question * * *" (p. 6a of Appendix).

Despite petitioner's straining to inject extraneous issues, such as the extent of the sovereign liability of the United States, in both similar and dissimilar situations, such as its liability vis a vis federal prison inmates (in relying upon cases such as *U. S.* v. *Demko,* 350 U. S. 149 (1966)), the issue remains as simply stated above.

It is submitted that petitioner is actually seeking to reargue *Reed* v. *The Yaka, supra,* by the device of raising artificial issues.

Petitioner's suggestion of conflict with the decisions of other Courts of Appeal, or other courts, is the result of erroneous misinterpretation of both the decision below and the other decisions to which petitioner points. The situation remains exactly as described in footnote 7 of the opinion below:

> "We are not alone in our interpretation of the Supreme Court's holding in *The Yaka. Every court that has been asked to apply that decision to facts similar to those presented to us has concluded that Sec. 5 of the Longshoremen's Act does not bar a suit against the shipowner-employer."* (Emphasis added)

Indeed, since the decision below was handed down, this Court has twice denied petitions for writs of certiorari in cases involving similar facts and the identical question of law where similar results obtained. On February 20, 1967, this Honorable Court denied a petition for rehearing by this very petitioner, Grace Line, Inc., in a suit against Michael J. Kanton, number 830, October Term, 1966, 17 L. Ed. 2d 812. The petition had originally been denied on January 9, 1967, reported at 17 L. Ed. 2d 548.

Likewise, petition for writ of certiorari in the case of *Pacific Inland Navigation Co.* v. *Course,* number 1000, October Term 1966, was denied on March 13, 1967, reported at 18 L. Ed. 2d 112. Both above cases arose in the Court of Appeals for the Ninth Circuit.

The cases upon which petitioner relies for "conflict" are readily distinguishable. For example, *Alcoa S. S. Company, Inc.* v. *Perez Rodriguez,* decided April 20, 1967 (not yet reported), and cited on page 6 of petition, is a case arising in the Court of Appeals for the 1st Circuit, decided entirely on the basis of Puerto Rican law. Thus at page 7 of the above opinion, it is stated:

> "In any event it is clear that in the present case we need not determine the exact scope of the *Yaka* decision."

Such case avails petitioner nothing to demonstrate "conflict" for the opinion disqualifies itself as inapplicable to the issue presented here. It was decided on the basis that Congress has never taken action to make the general maritime law of unseaworthiness applicable to Puerto Rico. See *Fonseca* v. *Prann,* 282 F. 2d 153, cert. den. 365 U. S. 860, *Rodriguez* v. *Waterman,* 290 F. 2d 175.

The weakness of petitioner's argument is perhaps most apparent in its citation of *Jackson* v. *Lykes Bros. S. S. Co.,* No. 575, October Term, 1966, wherein this Honorable Court granted a petition for a writ of certiorari to review a decision by the Supreme Court of Louisiana. In one breath, petitioner puts this case in the forefront of its argument concerning the importance of the question raised here. In the next breath, petitioner itself states at page 6:

> "However, that case (Jackson v. Lykes Bros. S. S. Co.) may not resolve some of the questions involved here concerning the extent of the liability of an actual shipowner for injuries to a longshoreman resulting from the breach of the warranty of seaworthiness in an admiralty suit brought in personam as well as in rem."

To petitioner's concession that the *Jackson* case may not resolve some of the questions presented here, we add further considerations demonstrating that the case does not support the grant of the relief petitioner seeks.

First, the *Jackson* case, *supra,* contained an alternative prayer for relief under the Jones Act, which is not involved here at all. For aught that has yet appeared, the summary dismissal by the State Court of the Jones Act prayer, standing alone, might well support the granting of a petition for certiorari. Next, the *Jackson* case, *supra,* is in accord with the opinion of the Court below in the case at bar to the extent that Jackson does recognize the right of a longshoreman to bring an action in admiralty in rem against his employer's vessel for injuries sustained by reason of its unseaworthiness. Thus in this respect, there is not only no conflict, there is express agreement. Moreover, the opinion of the Court below in the cases at bar negated any merit in the distinction attempted in Jackson between a suit in rem and one in personam, in determining the issue presented.

At page 7a the opinion below stated:

> "Nor do we see any merit in the attempted distinction that Reed did not sue his employer *in personam,* but rather brought an *in rem* action against *The* YAKA. The Supreme Court determined that Reed 'was not barred by the Longshoremen's Act from relying on *Pan-Atlantic's liability as a shipowner for the* YAKA's *unseaworthiness* in order to support his libel in rem against the vessel.' 373 U. S. at 415-16 (emphasis added). Thus, the crux of the opinion in *The* YAKA was the employer's *in personam* liability to its employees."

We will not dignify petitioner's arguments by way of analogy wherein it relies upon cases dealing with sovereign immunity among its reasons for granting certiorari herein. We agree with the Court below in stating, as it did in its footnote 6, that the considerations are quite different when the government is involved rather than a private individual.

Respectfully we repudiate the charge that the Court below overlooked this Honorable Court's decision in *Italia Soc.* v.

Oregon Stevedoring Co., 376 U. S. 315 (1964). Said case was called to the attention of the Court by both sides in their briefs, and the case does not involve the question here presented, but only the question as to the scope of the implied warranty of workmanlike service as between a stevedore and a shipowner.

It is not alone our position but that of the Court below that *Reed* v. *The YAKA, supra,* disposes of the issues here presented. It disposes of petitioner's efforts to distinguish the case at bar from cases involving three parties, on which point it concludes its petition. After rejecting any notion that the result in *Reed* v. *The YAKA, supra,* was predicated upon a three party and indemnity basis, the Court below states, in unequivocal language responsive to the instant issue, at page 7a of the Appendix herein:

> "* * * Thus, it is clear that Reed's right to sue Pan-Atlantic (his employer and owner *pro hac vice*), was not based on any hypothesis that Pan-Atlantic had a duty to indemnify Waterman, if the latter were liable because of the ship's unseaworthy condition. 'The only question,' the Court stated, 'is whether the Longshoremen's Act prevents recovery by petitioner for Pan-Atlantic's breach of *its* warranty of seaworthiness.' 373 U. S. at 412 (emphasis added). In the clearest terms the Court concluded that Section 5 of the Longshoremen's Act did not prevent an employee from suing his employer for breach of the warranty of seaworthiness, when his employer was also the owner of the vessel."

Underlying all the foregoing considerations, we urge that the issue presented is necessarily limited to longshoremen, directly employed by private shipowners. Even petitioner does not claim that this is a broad group of maritime workers or longshoremen whose rights would be affected; on the contrary, in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946) at page 102, this Court has referred to the in-

stance of the longshoreman directly hired by the shipowner as "presumably rare".

This, then, is a case of a narrow issue confined to a presumably small number of cases, whereon this Court has already spoken determinatively in *Reed* v. *The YAKA, supra,* and twice since denied petitions for certiorari on the same issue.

Its pronouncement has been followed. There is certainly no conflict between the Courts of Appeal or elsewhere. The decision below, carefully interprets this Court's holding; it is eminently correct and fair in that it gives the longshoreman directly employed by a private shipowner the same right to sue for damages for unseaworthiness as is enjoyed by a longshoreman employed by an independent contractor. It prevents a shipowner from altering the nature of his non-delegable duties by a mere contractual device which has been frowned upon since *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946).

No valid basis for granting the petition for writ of certiorari has been established.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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